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No. 05 - 7142

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 21 2006
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Timothy Williams,
Petitioner,
v.
William Overton et al.,
Respondents.

John H. Walton,
Petitioner,
v.
Barbara Bouchard et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The petition in these cases present two questions: (1) whether, to exhaust administrative remedies under the Prison Litigation Reform Act ("PLRA"), Pub. L. 104-134, 110 Stat. 1321 (1996), a prisoner plaintiff is required to have named all defendants to his or her federal civil rights suit in his or her underlying administrative grievances; and (2) whether the presence of one or more unexhausted claims requires a federal court to dismiss the prisoner's civil rights action in its entirety without leave to amend.

Respondents do not dispute that the federal courts of appeals are intractably divided over the questions presented. Respondents do not dispute that the questions presented recur with great frequency and are important. Respondents do not dispute that this case is an appropriate vehicle to resolve the questions presented. Having not rebutted any of the reasons articulated in Rule 10 of this Court for granting certiorari, respondents' nevertheless argue that certiorari should be denied because the court of appeals correctly decided the cases below.

For the reasons articulated in the petition, in petitioner's supplemental brief, in the *amici* brief of D.C. Prisoners' Legal Services Project Inc. *et al.*, and in this reply brief, the petition merits this Court's review and rejection of respondents' premature and misplaced merits-based arguments.

A. This Petition Presents Two Square Circuit Conflicts Meriting this Court's Review

Respondents do not dispute that the court of appeals' decisions on both questions presented squarely conflict with those of other circuits. *See* BIO at 6 ("Respondents acknowledge that the federal courts of appeals are split on the question of whether a prisoner must name a prison official in the grievance process in order to proceed in filing a lawsuit."); *id.* at 9 ("Respondents acknowledge that the federal courts of appeals are split on the issue of whether a prisoner must totally exhaust all of his administrative remedies against all parties or face dismissal of the entire complaint without prejudice."). Although respondents do not dispute our presentation of the split over the first question presented – the "name the

defendants" question – *compare* Pet. at 10-14 *with* BIO at 6-7, they contend that the conflict over the second question presented – the "total exhaustion" question – is "is not as stark as Petitioners suggest," BIO at 10. In particular, respondents note that, while the Fifth and Seventh Circuits have "indicated that an exhausted claim might proceed despite the complaints including an unexhausted claim," neither circuit has "expressly accepted or rejected total exhaustion." BIO at 9, 10. We will not argue at length with respondents over whether the Fifth and Seventh Circuits have conclusively ruled on the question.[1]

Whether the split is characterized as a 3-1-4[2] or 3-1-2[3] split is irrelevant to the need for this Court to promptly resolve the courts of appeals' disagreement over the "total exhaustion" issue. First, the inter-circuit conflict is well-recognized, entrenched, and shows no signs of resolving itself. The circuit split is well-recognized. *See, e.g., Lira*, 427 F.3d at 1170 (surveying split and noting "conflicting results"); *Beltran v. O'Mara*, 405 F. Supp. 2d 140, 156-57 (D.N.H. 2005) (cataloguing split). The circuit split is entrenched and shows no signs of resolving itself. For example, both the Sixth and Ninth Circuit – the

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[1] Respondents speculate that in *Lewis v. Washington*, 300 F.3d 829 (CA7 2003), "the Seventh Circuit was not presented with a total exhaustion" situation because "the decision never refers to any arguments by Defendants [and] it appears that the district court probably dismissed the case prior to service." BIO at 9-10. Had respondents looked closely at the *Lewis* decision, they would have seen that the Office of the Illinois Attorney General, who represented the defendants, argued the case on behalf of the defendants on appeal. *See Lewis*, 300 F.3d at 830.

Moreover, it is noteworthy that at least one district court within the Seventh Circuit believes that the Seventh Circuit has chosen a side and has adopted the position urged by petitioners. *See Henderson v. Sebastian*, No. 04-C-0039-C, 2004 WL 1946398, *5 (W.D. Wis. Aug. 25, 2004) ("I view the [Seventh Circuit's] tacit rejection of a total exhaustion requirement in § 1983 actions as consistent with the Second Circuit's holding [in *Ortiz v. McBride*, 380 F.3d 649 (CA2 2004), *cert. denied* 125 S. Ct. 1398 (2005)]. I believe that partial dismissal is the proper course to take addressing a suit containing both exhausted and unexhausted claims.").

[2] Under this presentation of the split, the Third, Sixth, and Tenth Circuits apply a strict "total exhaustion" requirement, *see Jones Bey v. Johnson*, 407 F.3d 801, 805 (CA6 2005), *cert. filed* 74 U.S.L.W. 3424 (Jan. 9, 2006) (No. 05-874); *Vasquez v. Ragonese*, 142 Fed. Appx. 606, 606 (CA3 2005), *cert. filed* (Nov. 22, 2005) (No. 05-8894); *Ross v. City of Bernalillo*, 365 F.3d 1181, 1189 (CA10 2004), the Eighth Circuit falls in the middle by allowing prisoner plaintiffs to avoid dismissal of their entire complaint by allowing them to amend their complaints and delete any unexhausted claims, *see Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (CA8 2003), and the Second, Fifth, Seventh, and Ninth Circuits apply a partial exhaustion rule that allows a district court to dismiss only unexhausted claims, *see Lira v. Herrera*, 427 F.3d 1164, 1170 (CA9 2005), *cert. filed* 74 U.S.L.W. 3425 (Jan. 6, 2006) (No. 05-878); *Johnson v. Johnson*, 385 F.3d 503, 533 (CA5 2004); *Ortiz*, 380 F.3d at 656-63; *Lewis*, 300 F.3d at 836.

[3] This presentation of the circuit split is the same as that presented *supra* at fn. 2, except that it presumes that the Fifth and Seventh Circuits have not yet chosen a side.

two courts of appeals to have most recently published decisions on the issue and whose decisions fall on opposite sides of the inter-circuit conflict – each denied rehearing en banc on the issue.[4] Moreover, the Second, Sixth, Eighth, Ninth, and Tenth Circuits all continue to apply their prior published decisions on the "total exhaustion" issue to new cases.[5]

Only this Court can bring needed uniformity to the questions presented, and as we show *infra* pp. 3-5, the need for this Court's intervention is urgent.

B. The Questions Presented Recur with Great Frequency and Are Important

Respondents do not dispute that the questions presented recur with great frequency and are important. As explained in the petition, prison civil rights suits outnumber every other kind of civil suit, including federal petitions for writs of habeas corpus. *See* Pet. at 5. We conceded in the petition that we know of no statistics indicating the percentage of the over 20,000 prison civil rights suits filed each year that involve the questions presented. *See id.* Nevertheless, we noted that the number must be immense because the questions presented are involved in some percentage of the most pervasive type of suit filed in the Nation's federal courts. *See id.* Our research into developments post-dating the filing of this petition confirms our suspicions.

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[4] The Sixth Circuit denied rehearing en banc in *Jones Bey* on October 13, 2005, and the Ninth Circuit did the same in *Lira* on December 13, 2005. This information is verifiable on the public PACER dockets for these cases. Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of them.

[5] Most recently, the Second Circuit applied *Ortiz* in *Dukes v. Dep. Supt. of Sec. A*, 153 Fed. Appx. 772, 773 (CA2 2005), the Sixth Circuit applied *Jones Bey* in the cases below, the Ninth Circuit applied *Lira* in *Del Raine v. Femme*, No. 03-57045, 2006 WL 64134, *1 (CA9 Jan. 9, 2006), the Eighth Circuit applied *Kozohorsky* in *Harris v. Kemna*, 155 Fed. Appx. 941, 941 (CA8 2005), and the Tenth Circuit applied *Ross*'s "total exhaustion" rule in *Strope v. McKune*, No. 05-3344, 2006 WL 246138, *1 (CA10 Feb. 2, 2006).

In the four months since this petition was filed on October 17, 2005, at least forty-one district court decisions have passed on the first question presented.[6] *See* App., *infra*, at 1a-3a. Thirty-four of those decisions have applied the "name the defendants" rule to dismiss prisoners' civil rights claims. *See id.* at 1a-2a. Eight of the forty-one decisions have refused to dismiss prisoners' civil rights claims because the prisoners failed to name a particular defendant in their administrative grievance. *See id.* at 3a.

Over the same short time period, at least forty-two district court decisions have passed on the second question presented. *See id.* at 3a-5a. Thirty-three of those decisions have applied the "total exhaustion" rule to dismiss the entirety of a prisoner's complaint without leave to amend because the complaint contained at least one unexhausted claim. *See id.* at 3a-5a. Nine of the forty-two district court decisions have refused to apply the "total exhaustion" rule. *See id.* at 5a.

The incredible frequency with which these issues arise and the persistence with which district courts resolve these issues inconsistently confirm that the federal courts are in disarray over how to apply the PLRA to the questions presented. Indeed, aside from the recent challenges to the constitutionality of the federal sentencing guidelines and one other PLRA issue not presented in this petition,[7] we can conceive of no other legal issues which have so frequently divided the federal courts. *See Mistretta v. United*

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[6] We include in an Appendix to this reply brief a list of citations to district court decisions that have passed on the questions presented. We emphasize that our numbers are necessarily under-inclusive. Although most of the cases cited in the Appendix are unreported decisions that are nonetheless available on Westlaw, most district court decisions are never released to Westlaw. A quick survey of the cases cited in the Appendix confirms this fact, as the overwhelming majority of the decisions cited in the Appendix come from the Western District of Michigan.

The abundance of cases from the Western District of Michigan – which is within the Sixth Circuit and must apply its law – also explains why, notwithstanding that the Sixth Circuit's interpretations of the questions presented fall on the minority side of the circuit splits, we have found so many more district court decisions consistent with the Sixth Circuit's interpretations. Because the Sixth Circuit falls on the minority side of the splits over the questions presented, we suspect that, if all of the Nation's district court decisions were available on Westlaw, a majority of district court decisions would reject the Sixth Circuit's views.

[7] The other PLRA issue that recurs with even greater frequency than the issues presented here is whether the PLRA requires dismissal of a prisoner's federal civil rights suit in the event that the prisoner neither attaches proof of exhaustion to his or her complaint nor describes with particularity how he or she exhausted his or her administrative remedies; or, instead, whether non-exhaustion is an affirmative defense to be pleaded and proven by the defense. This issue is presented in two presently pending petitions for certiorari: *Jones v. Bock*, No. 05-7058, and *Blay v. Reilly*, No. 05-8975.

States, 488 U.S. 361, 371 (1989) (granting certiorari to resolve "disarray among the Federal District Courts" over the constitutionality of the federal sentencing guidelines); *see also generally United States v. Booker*, 125 S. Ct. 738 (2005) (similar). This Court's resolution of these divisions is most urgently needed.

Even if the issues did not recur with such great frequency, this Court's intervention would still be warranted because of the importance of the issues at stake. As explained by *amici*, "[p]risoners have a constitutional right of access to the courts" to obtain relief on complaints related to imprisonment. *Amici* Br. at 3 (quoting *Bounds v. Smith*, 430 U.S. 817, 821 (1977)). One of the vehicles through which they may exercise this right is a federal civil rights action. *See Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam). In the decisions below, the court of appeals imposed "judicially-created impediments [that] have transformed the constitutional right of access to the courts into a complicated maze of traps for prisoners who seek to vindicate their rights." *Amici* Br. at 7. And, as we explain *infra* pp. 8-15, these judicially-imposed impediments find no support in the PLRA's text, structure, or underlying policy goals. Ensuring that prisoners' constitutional right of access to the courts is not unnecessarily impeded – particularly in light of the courts of appeals' disagreements over the propriety of such impediments – is a compelling reason for this Court to grant certiorari. When coupled with the frequency with which questions over these impediments recur, the need for this Court's intervention becomes dire.

C. This Petition Is An Appropriate Vehicle to Decide Both – or Either – of the Questions Presented

Respondents do not dispute that this Petition is an appropriate vehicle to decide both – or either – of the questions presented.[8] Indeed, respondents would be hard-pressed to do so because resolution of

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[8] Should the Court deem either of the two questions presented insufficiently cert-worthy, the Court would still be able to – and should – grant review of the other question. Additionally, we note that, since the petition was filed, this Court granted certiorari in *Woodford v. Ngo*, 126 S. Ct. 647 (2005) (No. 05-416). As we explained in our supplemental brief, "the question presented in *Ngo* * * * will not resolve the issues presented in this case." Supp. Br. at 3 n.2.

either question in petitioners' favor would revive at least part of petitioners' lawsuits. The record indisputably shows – and respondents do not dispute – that both petitioners exhausted at least one of their claims.[9] Accordingly, it is only through an application of both the Sixth Circuit's "name the defendants" rule and the Sixth Circuit's "total exhaustion" rule that it was able to justify dismissal of the entirety of petitioners' complaints without leave to amend, including those claims that petitioners indisputably exhausted. *See* Pet. App. at 6a (affirming dismissal of Williams' denial of surgery claim because the grievance relating to that claim "failed to name any of the appellees that Williams has named in his complaint" and affirming dismissal of Williams' exhausted single-occupancy cell claim "[d]espite [its] apparent exhaustion * * * due to Williams' failure to exhaust his medical claims"); *id* at 42a (affirming dismissal of Walton's claims against all defendants other than Bobo because "[h]e named only * * * Bobo in * * * his grievance process" and affirming dismissal of that claim, despite it being exhausted, because "[h]is claims as to all other defendants remain unexhausted"). It follows, therefore, that granting review of and reversing the court of appeals' application of either rule would revive at least some of petitioners' claims.

Additionally, it is of no moment that the court of appeals' decisions below were unpublished and relied on prior circuit precedent because "[t]his Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). This Court has frequently granted review of unpublished decisions, and those cases

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[9] In particular, as respondents acknowledge, Williams exhausted his claim that respondents Jamrog, Klee, Markwell, Pass, and Peterson wrongfully denied him a single-occupancy cell to accommodate his disabilities. *See* BIO at 2-3 ("Williams filed a grievance against Respondent Jamrog * * * [and] appealed the denial * * * through Steps II and III. * * * Prison officials denied his grievances at all three levels as to Klee, Markwell, Pass, and Peterson."); *see also* Pet. App. at 5a; Pet. at 8. Williams did not, however, name in his grievances any of the defendants whom he sued for improperly denying him a surgical procedure to remove tumors from his right arm and hand and related post-operative therapy. *See* Pet. App. at 6a, 19a; Pet. at 6-7; BIO at 2.

Similarly, as respondents acknowledge, Walton exhausted his discrimination claim against respondent Bobo. *See* BIO at 5 ("Petitioner did not exhaust his grievances against anyone other than Bobo."); *see also* Pet. App. 42a, 47a; Pet. at 9. Walton did not, however, name in his grievance any of the other defendants whom he sued for discrimination. *See* Pet. App. 42a, 47a; Pet. at 9-10; BIO at 5.

frequently involve situations, such as the situations here, where a court of appeals applied prior circuit precedent in an unpublished decision. *See, e.g., MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994) (granting review of short unpublished *per curiam* order holding that prior circuit precedent "conclusively" determined the outcome of the case).

Further underscoring the notion that the court of appeals' decision to not publish the decisions below is irrelevant to this petition's suitability for review is the fact that district courts within the Sixth Circuit have repeatedly relied on the decisions below for their precedential value, even though they were unpublished.[10]

D. The Decisions of the Court of Appeals Cannot Be Reconciled with This Court's Decisions or the PLRA's Statutory Text, Structure or Underlying Policy Goals

Respondents' primary opposition to the petition is its argument that the court of appeals correctly decided the cases below. Neither of the court of appeals' holdings in the two cases below can be reconciled with this Court's decisions or the PLRA's statutory text, structure, or underlying policy goals.

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[10] *See Shabazz v. Martin*, No. 00CV73005DT, 2006 WL 305673, *2 (E.D. Mich. Feb. 9, 2006) (relying on *Williams*); *Bentley v. Beckstrom*, No. Civ.A. 06CV07HRW, 2006 WL 149016, *2 (E.D. Ky. Jan. 18, 2006) (same); *Woodward v. Mason County Det. Ctr.*, No. Civ.A. 05-CV-225-WOB, 2005 WL 3440482, *3 (E.D. Ky. Dec. 14, 2005) (relying on *Williams* and *Walton*); *Iacovone v. Wilkinson*, No. 2:03-CV-652, 2005 WL 3299032, *2 (S.D. Ohio Dec. 2, 2005) (relying on *Walton*); *Marsh v. Price*, No. Civ.A. 05-CV-277-JMH, 2005 WL 3118121,*5 (E.D. Ky. Nov. 21, 2005) (relying on *Williams*); *Owens v. Simon*, No. 1:05-CV-733, 2005 WL 3107732, *3 (W.D. Mich. Nov. 18, 2005) (relying on *Walton*); *Blackefer v. Franklin County Reg'l Jail*, No. Civ.A. 05CV60KKC, 2005 WL 2897054, *2 (E.D. Ky. Nov. 2, 2005) (relying on *Williams* and *Walton*); *Grasty v. Samuels*, No. Civ.A. 05CV484KKC, 2005 WL 2708410, *2-*3 (E.D. Ky. Oct. 21, 2005) (same); *Van Over v. Booker*, No. Civ.A. 05CV371JMH, 2005 WL 2334684,*2 (E.D. Ky. Sep. 22, 2005) (relying on *Williams*); *Wilson v. Wilson*, No. Civ.A. 6:05-200-DCR, 2005 WL 2043064, *4 (E.D. Ky. Aug. 24, 2005) (same); *Chaney v. Catron*, No. Civ.A. 605324-DCR, 2005 WL 1801711, *3 (E.D. Ky. July 25, 2005) (same); *Casivant v. Gentry*, No. 2:05-CV-45, 2005 WL 1640599, *1 (E.D. Tenn. July 13, 2005) (same); *Reid v. Bell*, No. 2:05CV144, 2005 WL 1630105, *2 (E.D. Tenn. July 11, 2005) (relying on *Walton*).

Unlike some other circuits, the Sixth Circuit allows its district courts and litigants to cite to unpublished decisions as precedent. *Compare* CA6 R. 28(g) *with, e.g.*, CA9 R. 36-3.

1. The Sixth Circuit's "Name the Defendants" Rule Is Contrary to This Court's Decision in *Sims v. Apfel* and Contrary to the PLRA's Statutory Text

Respondents argue that "requiring prisoners to first name in the grievance process those they later name in the federal lawsuit is consistent with * * * the policy objective[] * * * to allow prison officials the opportunity to review issues at the administrative level first." BIO at 6. As a threshold matter, the PLRA's statutory text says nothing about naming all of the individual perpetrators of a claimed civil rights violation during the prison grievance process.[11] Nor does the Michigan Department of Corrections' ("MDOC") Policy Directive regarding prisoner grievances require Michigan prisoners to do so. *See* Pet. App. at 52a-58a (MDOC Policy Directive). Accordingly, the court of appeals' holding that petitioners were required to do so is nothing more than the judicial imposition of a requirement beyond the administrative system's own requirements. As such, it cannot be reconciled with this Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000), where this Court held that administrative exhaustion requirements are driven by the guidelines under which a claimant must exhaust his or her claims. *See id.* at 108 (rejecting argument that social security and disability benefits applicant was required to exhaust all challenges to denial of benefits where neither statute nor implementing regulations required exhaustion on an issue-by-issue basis). The *Sims* Court also noted that, where administrative proceedings "are inquisitorial rather than adversarial," *id.* at 111, the desirability of courts imposing exhaustion requirements beyond the applicable administrative guidelines "are much weaker," *id.* at 109. There is no dispute that prison grievance proceedings are "inquisitorial rather than adversarial."[12] *Id.* at 111; *see*

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[11] The PLRA's exhaustion provision merely states that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

[12] Indeed, as this Court previously noted, prison administrative hearings often lack the procedural protections present in adversarial proceedings:

> The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded.

(continued...)

also Porter v. Nussle, 534 U.S. 516, 528 (2002) (noting PLRA's "dominant concern[s] to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court"); Br. of 50 States and Territories as *Amicus Curiae* in Support of the Respondents, *Booth v. Churner*, No. 99-1964, at 1-2 ("Inmate grievance systems * * * provide far more efficient alternatives to litigation for resolving disputes, allowing disputing parties to focus on solutions rather than litigation tactics."). Accordingly, the court of appeals' imposition of a "name the defendants" exhaustion requirement beyond those articulated in the MDOC's Policy Directive is inappropriate.

Additionally, respondents' argument that "[i]f a prisoner does not name a specific wrong-doer in the administrative process there is *no way* for prison officials to correct the alleged problem and, if necessary, discipline the wrong-doer," BIO at 6, is belied by the record developed below in both cases. For example, in Walton's case, even though he never named respondent Gearin in his administrative grievances, the MDOC learned while investigating Walton's grievance against respondent Bobo that Gearin was actually responsible for the "indefinite upper slot restriction" that Walton claimed to be discriminatory. *See* Pet. App. at 42a ("[I]n response to his Step I grievance * * * the prison told him that ADW Gearin gave him the upper slot restriction.").[13] Similarly, in Williams' case, even though Williams' Step I denial of surgery grievance did not name any defendants, the grievance process itself – specifically, the MDOC's Step II response – identified defendant Pramstaller as being responsible for the denial of Williams' surgery request. *See* Williams Compl. Ex. A. Additionally, even though respondent Overton was never named in Williams' denial of surgery grievance, Overton himself denied Williams' grievance at Step III, *see id.*, and it is on the basis of this denial and in Overton's supervisory

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[12](...continued)
Information presented often was hearsay or self-serving. The [reviewing prison officials] were not truly independent.

Cleavinger v. Savage, 474 U.S. 193, 196 (1985).

[13] As noted in the petition, the MDOC provides a three-step grievance procedure. *See* Pet. at 6-7 n.6.

capacity as MDOC Director that Williams sued him. Accordingly, Overton clearly had notice of Williams' claims against him too. In sum, both Walton's and William's grievances provided the MDOC and at least some unnamed defendants with precisely the kind of notice that respondents claim that there is "no way" to obtain.

Because neither the PLRA's statutory text nor the MDOC grievance procedures require PLRA plaintiffs to grieve against each defendant in their federal complaints, the Sixth Circuit's imposition of this judicially-created requirement was erroneous. Moreover, because petitioners gave the MDOC sufficient notice of the substance of their claims, such that the MDOC learned the identities of the persons actually responsible for violating petitioners' civil rights, their suits against at least those individuals should have been allowed to go forward.

2. The Sixth Circuit's "Total Exhaustion Rule" Is Inconsistent with the PLRA's Statutory Text, Structure, and Underlying Policy Goals

Respondents assert that the court of appeals' "total exhaustion rule" "is consistent with the text of the statute." BIO at 10. In doing so, they argue that, because the PLRA's exhaustion provision, 42 U.S.C. § 1997e(a), states that no "action" shall be brought in federal court until administrative remedies have been exhausted, but the subsection prescribing rules for dismissal refers to "actions" or "claims," *id.* § 1997e(c)(1) & (2), Congress intended that prisoners exhaust administrative remedies on all claims before commencing an action. *See* BIO at 10-11. Contrary to respondents' argument and the court of appeals' holding below, in three respects, § 1997e(c) indicates that district courts need not dismiss an entire action without leave to amend because of the presence of one unexhausted claim.

First, in § 1997e(c), Congress ordered dismissal of *certain* defective suits and claims – namely, those that are "frivolous, malicious, fail[] to state a claim upon which relief can be granted, or seek[] monetary relief from a defendant who is immune from such relief," 42 U.S.C. § 1997e(c)(1), "but *did not* include mixed actions among those actions that must be dismissed. *Lira*, 427 F.3d at 1171 (emphasis

added); *see also Ortiz*, 380 F.3d at 657 ("Section 1997e(c) * * * the place where we would expect to find guidance as to whether dismissal of 'mixed actions' is required[,] is silent on the issue."). This omission establishes that "no special rule regarding the treatment of mixed complaints was intended." *Lira*, 427 F.3d at 1172.

Second, § 1997e(c)(2)'s reference to dismissal of a "claim" for failure to exhaust, juxtaposed to § 1997e(c)(1)'s reference to dismissal of an "action," "indicates that unexhausted claims can be treated independently, for dismissal purposes, from the action as a whole. *Id.* Indeed, "[t]here would be little point in providing for the dismissal of some nonexhausted claims on the merits if the remainder of the action would then have to be dismissed, although exhausted, because of the failure to exhaust the dismissed claims." *Id.*

Third, interpreting the word "action" in § 1997e(a) and (c)(1) to indicate that an exhaustion defect in any claim infects the suit as a whole "would 'render[] subsection (c)(2) superfluous.'" *Id.* (quoting *Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part)). If § 1997e(a) demands a "total exhaustion" dismissal rule because it uses the word "action," then § 1997e(c)(1), because it uses the word "action," must also require dismissal of the entire case if any claim is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." "Yet, § 1997e(c)(1) must apply only when *all* the claims meet the statutory standard for summary dismissal on the merits, not when only some of them do." *Id.*; *see also Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part). Otherwise, § 1997e(c)(2), which contemplates the dismissal of individual frivolous "claims," would be "unnecessary." *Lira*, 427 F.3d at 1172. In other words, "the inclusion of a single frivolous claim would contaminate the entire action, mandating dismissal under § 1997e(c)(1)." *Id.* To read § 1997e(c)(1)'s use of the word "action" as precluding dismissal of individual defective claims would therefore clash with the "rule against superfluities" in statutory construction. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

In sum, the use of the term "action" elsewhere in the PLRA does not support interpreting § 1997e(a) as dictating a "total exhaustion" dismissal rule. "To the contrary, while 'action' in the PLRA refers to the case as a whole, the statute consistently uses the term in a manner that contemplates dismissing the entire action only if the entire action fails to meet statutory standards." *Lira*, 427 F.3d at 1173. When some claims are valid and others are not, the usual procedural norm – that when a complaint has both good and bad claims, only the bad claims are dismissed – should prevail.

Respondents assert that "requiring total exhaustion is consistent with this Court's habeas corpus jurisprudence." BIO at 10. Drawing a parallel between the PLRA and habeas corpus law is unnecessary because, when the PLRA's text and structure are properly considered, there is no need to analogize to habeas corpus jurisprudence. *See Lira*, 427 F.3d at 1173. This Court's decision mandating "total exhaustion" in the habeas context – *Rose v. Lundy*, 455 U.S. 509 (1982) – did so exclusively for policy reasons because the applicable habeas statute was uninformative. *See id.* at 516-17 (analyzing the "policies underlying the statutory provision to determine its proper scope" when the text found to be ambiguous). But where the statutory language and structure answer an interpretation question, resorting to policy evaluation is inappropriate. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (noting that "[s]tatutory intent * * * is determinative" and that it will not be disregarded "no matter how desirable that might be as a policy matter"). Moreover, even if this Court were to consider its habeas jurisprudence, it would be unhelpful. First, *Rose* does not require dismissal of an entire habeas action without leave to amend, as the court of appeals in these PLRA cases did. *Rose* expressly held that a habeas petitioner "can always amend the petition to delete unexhausted claims." *Rose*, 455 U.S. at 520. Additionally, this Court's decision in *Rhines v. Weber*, 125 S. Ct. 1528 (2005), modified the *Rose* rule to allow district courts to stay habeas petitions containing both exhausted and unexhausted claims to allow petitioners to exhaust their unexhausted claims in state court without having to re-file and face a possible statute of limitations bar. *See id.* at 1535. Thus, respondents' habeas analogy "does not support

the inflexible total exhaustion-dismissal rule" that the court of appeals applied. *Lira*, 427 F.3d at 1173 n.10.

Respondents also assert that "the total exhaustion rule is consistent with the overall policy of the PLRA." BIO at 11. Even if this Court were to take policy considerations into account – which, as we note above, *see supra* pp. 12-13, it should not – such considerations support *rejection* – rather than endorsement – of the Sixth Circuit's "total exhaustion" rule.

As this Court identified, and as respondents properly note, *see* BIO at 11, "Congress enacted [PLRA] § 1997e(a) to reduce the quantity and improve the quality of prisoner suits" by filtering out frivolous claims, satisfying some grievances, and developing an administrative record for use in cases that go forward. *Porter*, 534 U.S. at 524-25. Respondents argue that the Sixth Circuit's "total exhaustion" rule satisfies this policy objective in three ways, none of which are persuasive.

First, respondents argue that "[a]bsent total exhaustion the courts will be mired in the screening process, sorting through piles of documents, trying to determine whether the inmate exhausted his claim in all steps of the grievance process." BIO at 12. This argument founders on its premise. District courts are not required under the PLRA to screen prisoner complaints for non-exhaustion. Indeed, as noted above, *supra* pp. 10-11, the PLRA's pre-screening provision allows a district court to dismiss a prisoner's civil rights complaint only "if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c)(1). Nowhere in the PLRA did Congress specify that a court may dismiss a PLRA claim for failure to properly exhaust.

Second, respondents argue that the "total exhaustion rule avoids piecemeal litigation." BIO at 13. This argument ignores the reality that some "prisoner[s] who ha[ve] filed an improper mixed complaint can * * * refile, including only the properly exhausted claims, while exhausting the remaining claims and

filing another suit later."[14] *Lira*, 427 F.3d at 1174 (citing *Jones Bey*, 407 F.3d at 811-12 (Clay, J., concurring in part and dissenting in part); *Ortiz*, 380 F.3d at 658). This would promote the precise inefficiency and waste of judicial resources – namely, requiring district courts to docket, assign, and process two cases where one would suffice – that the PLRA was designed to prevent.[15] *See id.*

Finally, respondents argue that "the total exhaustion rule * * * encourag[es] prisoners and prison officials to make full use of the prison grievance procedure * * * and would aid the Federal courts by ensuring that there was a full administrative record for each of the prisoner's claims." BIO at 13. Crucially, however, the "total exhaustion" rule adopted by the Sixth Circuit and urged by respondents here makes little sense in the context of prison condition suits because a PLRA plaintiff's claims may have little to do with each other – temporally or substantively – as is the case with petitioner Williams' suit. Under the Sixth Circuit's "total exhaustion" rule, both of Williams' claims were dismissed even though there is no dispute that Williams exhausted his single-occupancy cell claim. Dismissing both of Williams' claims to allow him to exhaust his denial of surgery claim will do nothing to assist the lower courts in addressing Williams' single-occupancy cell claim because that claim was already exhausted

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[14] Unlike habeas corpus cases, *see* 28 U.S.C. § 2244(b); *see also Mayle v. Felix*, 125 S. Ct. 2562, 2570 (2005) (recognizing that "federal habeas claims, by their very nature, challenge the constitutionality of a [single] conviction or sentence"), there is no preclusion to filing more than one PLRA suit. Additionally, PLRA claims joined into a single action may concern entirely independent underlying factual bases – as is the case with petitioner Williams' complaint – such that ordinary claim preclusion doctrines would not bar a subsequent suit. "Which claims are joined in a given PLRA lawsuit * * * is entirely up to the plaintiff. As a result, the goal of avoiding piecemeal litigation is far less achievable than in the habeas context, where a single conviction is at issue and severe restrictions on second and successive petitions ordinarily require that all challenges to that conviction be joined in a single [habeas] petition." *Lira*, 427 F.3d at 1174 (citing 28 U.S.C. § 2244(b)).

[15] Of course, dismissal of an entire action for lack of "total exhaustion" may result in precluding or deterring a prisoner from pursuing a properly *exhausted* claim – such as Williams' single-occupancy cell claim or Walton's discrimination claim against respondent Bobo – because of a statute of limitations barrier or the prisoner's inability to pay an additional filing fee. *See Lira*, 427 F.3d at 1174-75. Many prisoners – like petitioners, *see* Pet'rs' IFP Applications – are unable to pay a full filing fee at the inception of their lawsuits and, consequently, will be out of court while their claims become stale. "[I]mposition of such barriers with regard to properly brought claims * * * risk * * * precluding meritorious, fully exhausted claims," *id.* at 1175, in violation of prisoners' "constitutional right of access to the courts," *Bounds*, 430 U.S. at 821. To this end, respondents' assertion that "prisoners can still proceed *in forma pauperis*. * * * [and] will not be denied an opportunity to [re-file] and proceed on all properly exhausted claims," BIO at 14, ignores reality.

and a full administrative record was already developed. *See Lira*, 427 F.3d at 1174 ("[E]xhausting one of these causes of action would not help satisfy the plaintiff, weed out frivolous complaints, or develop an administrative record with respect to the other [claims], entirely separate matters."). And, as noted above, *supra* pp. 9-10, the grievances underlying both petitioners' unexhausted claims did help develop a meaningful administrative record, insofar as the grievance processes themselves identified the individuals truly responsible for the deprivation of petitioners' constitutional rights.

With no risk of a prisoner using "the exhaustion of one claim as a hook to have many exhausted claims considered in a federal civil rights action, adoption of a total exhaustion-dismissal rule would do nothing to advance Congress's policy goals." *Lira*, 427 F.3d at 1175 (internal quotation marks and citation omitted).

CONCLUSION

For the foregoing reasons and those stated in the petition and the *amici* brief of D.C. Prisoners' Legal Services Project Inc. *et al.*, certiorari should be granted.

Respectfully submitted,

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February 21, 2006

APPENDIX

A. District Court Cases Dismissing Claims Because Prisoner Failed to Name Defendant in Administrative Grievance – October 17, 2005, to February 16, 2006

Adams v. Paquet, No. 2:05-CV-260, 2005 WL 3371853, *2 (W.D. Mich. Dec. 12, 2005)

Adams v. West, No. 2:05-CV-259, 2005 WL 3454712, *1-*2 (W.D. Mich. Dec. 16, 2005)

Annabel v. Eyke, No. 2:05-CV-209, 2005 WL 2758077, *2 (W.D. Mich. Oct. 25, 2005)

Anthony v. Hill, No. 2:06-CV-9, 2006 WL 357792, *2 (W.D. Mich. Feb. 15, 2006)

Baggett v. Smith, No. 1:05-CV-804, 2006 WL 13023, *2 (W.D. Mich. Jan 3, 2006)

Brintley v. Corrections Medical Services, No. 02-CV-11, 2006 WL 357794, *2 (W.D. Mich. Feb. 15, 2006)

Briscoe v. Anderson, No. 1:05CV2429, 2006 WL 144115, *3 (N.D. Ohio Jan.17, 2006)

Campbell v. Trevino, No. 1:05-CV-748, 2006 WL 357050, *2 (W.D. Mich. Feb. 15, 2006)

Colston v. Lindsey, No. 2:05-CV-282, No. 2006 WL 335669, *2 (W.D. Mich. Feb. 13, 2006)

Copenhaver v. Hammer, No. 1:05-CV-675, 2005 WL 2899673, *3 (W.D. Mich. Nov. 3, 2005)

Courtney v. Caruso, No. 4:05-CV-83, 2005 WL 2671283, *2 (W.D. Mich. Oct. 19, 2005)

Daily v. Blackford, No. 2:05-CV-253, 2006 WL 15429,*2 (W.D. Mich. Jan. 4, 2006)

Diaz v. Rutter, No. 2:05-CV-239, 2005 WL 3262440, *4 (W.D. Mich. Nov. 30, 2005)

Duerson v. Henderson County Det. Ctr., No. Civ.A. 405CVP165M, 2005 WL 3134049, *2 (W.D. Ky. Nov. 23, 2005)

El-Shabazz v. Dunn, No. 2:05-CV-17, 2006 WL 335659, *4 (W.D. Mich. Feb. 13, 2006)

Fry v. Correctional Medical Services, Inc., No. 1:05-CV-637, 2005 WL 2759194, *1 (W.D. Mich. Oct. 25, 2005)

Harris v. Edlund, No. 2:05-CV-270, 2006 WL 250699, *1-*2 (W.D. Mich. Feb 1, 2006)

Harris v. Healy, No. 2:05-CV-247, 2006 WL 250628, *2 (W.D. Mich. Feb. 1, 2006)

Hessen v. Parker, No. 1:05-CV-640, 2005 WL 2758074,*2 (W.D. Mich. Oct. 25, 2005)

Jennings v. Bergh, No. 2:06-CV-1, 2006 WL 357666, *1 (W.D. Mich. Feb. 15, 2006)

Littleton v. Jones, No. 1:05-CV-662, 2005 WL 3337573, *1 (W.D. Mich. Dec. 8, 2005)

McKaye v. Naples, No. 2:05-CV-244, 2005 WL 3262443, *2 (W.D. Mich. Dec. 1, 2005)

Nelson v. Parkhurst, No. 4:05-CV-126, 2005 WL 3556079, *2 (W.D. Mich. Dec. 29, 2005)

Owens v. Simon, No. 1:05-CV-733, 2005 WL 3107732, *3 (W.D. Mich. Nov. 18, 2005)

Payne v. Hofbauer, No. 2:05-CV-245, 2005 WL 3371443, *1 (W.D. Mich. Dec. 12, 2005)

Pew v. Torma, No. Civ.A. 03-1728, 2005 WL 3447926, *3 (W.D. Pa. Nov. 4, 2005)

Porter v. Caruso, No. 1:05-CV-562, 2005 WL 2679785, *3 (W.D. Mich. Oct. 20, 2005)

Rector v. Morgan, No. 3:05-CV-192, 2005 WL 3465680, *1-*2 (E.D. Tenn. Dec. 19, 2005)

Shavers v. McKee, No. 1:06 CV 40, 2006 WL 322482, *3 (W.D. Mich. Feb. 10, 2006)

Swanchara v. Falbo, No. 2:05-CV-238, 2005 WL 2978892, *2-*3 (W.D. Mich. Nov. 7, 2005)

Torrez v. McKee, No. 1:05-CV-785, 2005 WL 3535058, *2 (W.D. Mich. Dec. 22, 2005)

Wappler v. Brevard, No. 4:05-CV-90, 2005 WL 2671278, *3 (W.D. Mich. Oct. 19, 2005)

Williams v. Hollibaugh, No. Civ. 3:04-CV-2155, 2006 WL 59334, *7-*8 (M.D. Pa. Jan. 10, 2006)

Woolfolk v. Whitehurst, No. 3:05-CV-320-J-20MMH, 2005 WL 3118409, *3 (M.D. Fla. Nov. 22, 2005)

B. District Court Cases Refusing to Dismiss Claims on Basis that Prisoner Failed to Name Defendant in Administrative Grievance – October 17, 2005, to February 16, 2006

Boomer v. DePerio, 405 F. Supp. 2d 259, 261-62 (W.D.N.Y. 2005)

Davis v. Hyden, No. A02-214 CV (JKS), 2005 WL 3116641, *2 (D. Ak. Nov. 21, 2005)

Hunziker v. Adams, No. CV-F-03-6069 OWW, 2005 WL 3284313, *2-*3 (E.D. Cal. Nov. 29, 2005)

Jamison v. Rich, No. Civ.A. CV605-066, 2006 WL 197196, *1 (S.D. Ga. Jan. 23, 2006)

Lindell v. O'Donnell, No. 05-C-04-C, 2005 WL 2740999, *20-*21 (W.D. Wis. Oct. 21, 2005)

Mester v. Kim, No. CVF046580RECSMSP, 2005 WL 3507975, *2 (E.D. Cal. Dec. 22, 2005)

Smith v. Berge, No. 04 C 1009, 2006 WL 218067, *10 (E.D. Wis. Jan. 27, 2006)

C. District Court Cases Applying the "Total Exhaustion" Rule to Dismiss Entire Prisoner Actions – October 17, 2005, to February 16, 2006

Adams v. Paquet, No. 2:05-CV-260, 2005 WL 3371853, *2 (W.D. Mich. Dec. 12, 2005)

Alexander v. Williams, No. 1:05-CV-663, 2005 WL 3072017, *2 (W.D. Mich. Nov. 16, 2005)

Annabel v. Eyke, No. 2:05-CV-209, 2005 WL 2758077, *2 (W.D. Mich. Oct. 25, 2005)

Anthony v. Hill, No. 2:06-CV-9, 2006 WL 357792, *2 (W.D. Mich. Feb. 15, 2006)

Baggett v. Smith, No. 1:05-CV-804, 2006 WL 13023, *2 (W.D. Mich. Jan 3, 2006)

Bentley v. Beckstrom, No. Civ.A. 06CV07HRW, 2006 WL 149016, *2 (E.D. Ky. Jan. 18, 2006);

Brintley v. Corrections Medical Services, No. 02-CV-11, 2006 WL 357794, *2 (W.D. Mich. Feb. 15, 2006)

Briscoe v. Anderson, No. 1:05CV2429, 2006 WL 144115, *3 (N.D. Ohio Jan.17, 2006)

Campbell v. Trevino, No. 1:05-CV-748, 2006 WL 357050, *2 (W.D. Mich. Feb. 15, 2006)

Colston v. Lindsey, No. 2:05-CV-282, No. 2006 WL 335669, *2 (W.D. Mich. Feb. 13, 2006)

Courtney v. Caruso, No. 4:05-CV-83, 2005 WL 2671283, *2 (W.D. Mich. Oct. 19, 2005)

Daily v. Blackford, No. 2:05-CV-253, 2006 WL 15429,*2 (W.D. Mich. Jan. 4, 2006)

Diaz v. Rutter, No. 2:05-CV-239, 2005 WL 3262440, *4 (W.D. Mich. Nov. 30, 2005)

Duerson v. Henderson County Det. Ctr., No. Civ.A. 405CVP165M, 2005 WL 3134049, *2 (W.D. Ky. Nov. 23, 2005)

Ellibee v. Sebelius, No. 04-3403-JAR, 2005 WL 3503483, *5 (D. Kan. Dec. 22, 2005)

El-Shabazz v. Dunn, No. 2:05-CV-17, 2006 WL 335659, *4 (W.D. Mich. Feb. 13, 2006)

Grasty v. Samuels, No. Civ.A. 05CV484KKC, 2005 WL 2708410, *2-*3 (E.D. Ky. Oct. 21, 2005)

Harnage v. Swanson, No. 05-3098-JTM, 2006 WL 269974, *11 (D. Kan. Feb. 3, 2006)

Harris v. Edlund, No. 2:05-CV-270, 2006 WL 250699, *1-*2 (W.D. Mich. Feb 1, 2006)

Harris v. Healy, No. 2:05-CV-247, 2006 WL 250628, *2 (W.D. Mich. Feb. 1, 2006)

Harris v. Hoover, No. 2:05-CV-269, 2006 WL 15404, *2 (W.D. Mich. Jan. 4, 2006)

Jennings v. Bergh, No. 2:06-CV-1, 2006 WL 357666, *1 (W.D. Mich. Feb. 15, 2006)

Kitchen-Bey v. Michigan Dep't of Corr., No. 2:05 CV 267, 2006 WL 62827, *3 (W.D. Mich. Jan. 10, 2006)

McKaye v. Naples, No. 2:05-CV-244, 2005 WL 3262443, *2 (W.D. Mich. Dec. 1, 2005)

Owens v. Simon, No. 1:05-CV-733, *3 2005 WL 3107732, *3 (W.D. Mich. Nov. 21, 2005)

Payne v. Hofbauer, No. 2:05-CV-245, 2005 WL 3371443, *1 (W.D. Mich. Dec. 12, 2005)

Rand v. Antonini, No. Civ.A. 05-CV-70969, 2005 WL 3163390, *1, *3-*4 (E.D. Mich. Nov. 28, 2005)

Rector v. Morgan, No. 3:05-CV-192, 2005 WL 3465680, *1-*2 (E.D. Tenn. Dec. 19, 2005)

Reynolds v. Harris-Spicer, No. 1:05-CV-527, 2005 WL 2990486, *4 (W.D. Mich. Nov. 8, 2005)

Schultz v. Frontera, No. 2:05-CV-258, 2005 WL 3454695, *3 (W.D. Mich. Dec. 16, 2005)

Swanchara v. Falbo, No. 2:05-CV-238, 2005 WL 2978892, *2-*3 (W.D. Mich. Nov. 7, 2005)

Torrez v. McKee, No. 1:05-CV-785, 2005 WL 3535058, *2 (W.D. Mich. Dec. 22, 2005)

Vartinelli v. Moskalik, No. 1:03-CV-323, 2006 WL 314448, *2 (W.D. Mich. Feb 9, 2006)

D. District Court Cases Refusing to Apply the "Total Exhaustion" Rule to Dismiss Entire Prisoner Actions – October 17, 2005, to February 16, 2006

Beltran v. O'Mara, 405 F. Supp. 2d 140, 157-59 (D.N.H. 2005)

Burgess v. Pliler, No. S-03-0643 GEB GGH P, 2006 WL 278588, *7 (E.D. Cal. Feb. 3, 2006)

Campbell v. Chaves, 402 F. Supp. 2d 1101, 1108-09 (D. Ariz. 2005)

Copenhaver v. Hammer, No. 1:05-CV-675, 2005 WL 2899673, *3 (W.D. Mich. Nov. 3, 2005)

Mullicane v. Marshall, No. F 03 6299 AWILJO P, 2005 WL 3299079, *2 (E.D. Cal. Dec. 1, 2005)

Porter v. Caruso, No. 1:05-CV-562, 2005 WL 2679785, *3-*4 (W.D. Mich. Oct. 20, 2005)

Shabazz v. Martin, No. 00CV73005DT, 2006 WL 305673, *2-*3 (E.D. Mich. Feb. 9, 2006)

Shavers v. McKee, No. 1:06 CV 40, 2006 WL 322482, *3 (W.D. Mich. Feb. 10, 2006)

Wappler v. Brevard, No. 4:05-CV-90, 2005 WL 2671278, *3-*4 (W.D. Mich. Oct. 19, 2005)